Case No. 16-60106

United States Court of Appeals
For The Fifth Circuit

REMINGTON LODGING & HOSPITALITY, LLC,

Petitioner/Cross-Respondent,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent/ Cross-Petitioner.

On Petitions for Review and Cross-Application for Enforcement of
an Order of the National Labor Relations Board
Case No. 29-CA-093850 & 29-CA-095876

CORRECTED BRIEF OF PETITIONER REMINGTON LODGING & HOSPITALITY, LLC, d/b/a SHERATON ANCHORAGE

Respectfully submitted,

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I. CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

1. Remington Lodging & Hospitality, LLC – the Petitioner for Review.
2. Remington Holdings, L.P. – the parent company of the Petitioner for Review (a privately held company, with its headquarters in Dallas, Texas).
3. Ashford Hospitality Trust, Inc. – the owner of the hotel at issue in this case – The Hyatt Regency Long Island. Ashford Hospitality Trust is a publicly traded company (stock exchange symbol: AHT).
4. The law firm Stokes Wagner (offices in Atlanta, San Diego, Los Angeles, and Ithaca, N.Y.) – attorneys for the Petitioner for Review.
5. Local 947, United Service Workers Union, affiliated with the International Union of Journeymen and Allied Trades – the charging party union in this case.

II. STATEMENT REGARDING ORAL ARGUMENT

Remington Lodging & Hospitality, LLC, the Petitioner for Review, respectfully submits that oral argument will be helpful to the Court. The facts at issues are detailed, numerous and nuanced, and the application of Board law often requires the making of fine distinctions.

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III. STATEMENT OF JURISDICTION

Jurisdiction for a Petition for Review of a Decision and Order of the National Labor Relations Board is conferred by Section 10(f) of the National Labor Relations Act [29 U.S.C. § 160(f)], which provides in pertinent part: "Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any United States court of appeals in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia . . ."

The Petitioner maintains its primary office, where it transacts business, in Dallas, Texas.

Jurisdiction therefore lies with this Court.

IV. STATEMENT OF THE ISSUES

1. Whether substantial evidence and correct law supports the decision and order of the National Labor Relations Board, which found an 8(a)(1) and (3) violation of the National Labor Relations Act relating to the decision by Petitioner Remington to outsource the staffing of the housekeeping department at the subject hotel in the summer of 2012.

2. Whether substantial evidence and correct law supports the decision and order of the National Labor Relations Board, which found an 8(a)(1) and (3) violation of the National Labor Relations Act with respect to the discharge of employee Margaret Loiacono.

V. STATEMENT OF THE CASE

A. Introduction: The Employer Hotel and the Charging-Party Union

Petitioner Remington Lodging & Hospitality, LLC ("Remington") is a Dallas, Texas based hotel management company, which at the time of the events in this case managed approximately 70 hotels. Remington manages these hotels for a number of independent owners, and for a number of different brands – including Hilton, Marriott, Westin and Sheraton (the owners and brand-licensors, in most cases, are separate businesses).

The hotel involved in this case, the Hyatt Regency Long Island – near the town of Hauppauge, N.Y. – entered Remington's management portfolio in December of 2011. This was the first 'Hyatt' ever managed by Remington, and for that reason success in operating this hotel was of key importance to the company. Remington, quite naturally, was aiming to add more Hyatt hotels to its management portfolio. (Tr., pp. 609-11).

In late April of 2012, [1] a lone organizer for the charging-party union – Local 947 of the United Service Workers Union (the "Union") – began making occasional visits to the Hotel and speaking with small numbers of employees. As shown below, this organizing effort by the lone organizer was conducted very

[1] All dates, unless otherwise noted, are 2012, when most of the material events occurred.

quietly and in secret. This effort, during the first half of the summer, bore little fruit. No authorization cards were signed until July 4. As of July 11, in a bargaining unit with approximately 120 employees, only 11 had been convinced to sign a card. ROA.6 & 13.

B. The June 28, 2012 decision by Remington to Re-Outsource the Staffing of the Housekeeping Department, which Took Effect on August 21.

Remington inherited a problem when taking over this hotel in December of 2011. The guest-satisfaction scores ranked near the very bottom of all Hyatt-branded properties in the United States. Out of the 142 Hyatt hotels in the "Americas," the Hyatt Regency Long Island ranked 139 (*fourth worst*) in the category of "Likelihood to Recommend" (over the period Q.2-2011 through Q.1-2013); ranked 141 (*next to last*) in "Customer Service" (same period); and ranked 140 for "Overall Satisfaction" (over the 12 months of CY-2012). (Tr., pp. 78, 759-68), (testimony of Jeff Rostek, the hotel's general manager, explaining survey data generated by a company used by Hyatt, known as Medallia, at (Exhibit R-27). [2]

This was a serious problem. As one witness, with 20 years' prior experience as a hotel manager, testified: "We lived and died by [the guest satisfaction scores]

[2] Regarding the survey report, at (Exhibit R-27): The names of the 142 hotels have been redacted, except where the Hyatt Regency Long Island appears. The first three pages show "Likelihood to Recommend," the next three "Customer Service," and the last five "Overall Satisfaction." NOTE: these rankings are based on accumulated scores over the periods described in the text above. Although Remington was turning the ship in the right direction by 2013, at the time of the hearing, the accumulated rankings remained low, Rostek testified, "because the past was so bad." (Tr., p. 760).

... if you don't take care of the customer, they're not happy, they're not coming back." (Tr., pp. 460-461). In turn, if guests continue to give low scores, and not return, an owner and management company could risk losing rights to the brand. "[W]hen you're a franchisee like Remington ... if you don't hit certain benchmarks you could be in jeopardy of losing your flag [the brand rights]." *Id*. At risk, for the owner and manager, is not only the loss of the name-recognition power of the brand, but also the brand's reservation system and frequent-guest programs, both of which which drive guests into the hotel.

The guest-satisfaction problem was particularly acute in the housekeeping department. The component score for "guest rooms" – the primary indicator for the effectiveness of housekeeping (ROA.37, lines 5-21) – remained in the cellar throughout the first half of 2012. In March of that year, the score was 20.4 against a brand-average benchmark of 50.0. From there, matters worsened and failed to recover: April at 6.0; May at 8.3; June at 1.1; July at 9.9; and August at 4.3. *See*, ROA.44. [3]

When Remington first assumed the management of the hotel, in December 2011, the housekeeping department was operated by Hospitality Staffing Services ("HSS"), an outplacement contractor whose primary role was to provide staffing

[3] The "guest room" scores in ROA.44, cited above, are in the grouping labelled "Drivers" – fifth line down.

for this department. Shortly following takeover, Remington assumed full control of the housekeeping department, and became the sole employer.

The abysmal guest-satisfaction scores for housekeeping caught the attention of Sileshi Mengiste – the Jacksonville, Florida based divisional vice president over the company's four-hotel "luxury" division, (Tr., pp. 609-10), which included the Hyatt Regency Long Island. "Sometime between mid-June and June 28," the Board found, "the [company] began to explore the possibility of outsourcing its housekeeping work at the hotel." [ROA.1]. These discussions were primarily between Mengiste and Evan Studer, the company's Executive Vice-President of Operations (based in Dallas and second in command to the company president, with responsibilities for all 70 hotels). (Tr., pp. 612, 629-30 and 476-78). The reference to "June 28," in the above finding of the Board, is to the date of a memo Mengiste sent to Remington president Mark Sharkey, which followed his earlier-in-June discussions with Mr. Studer. The memo (copied to Studer) opened with:

> As you are aware, the hotel made the decision some time ago to bring the outsourced housekeeping department in-house in order to improve guest satisfaction and operations scores. This approach has not delivered the expected results as our scores are still a major problem for this hotel.
>
> In order to improve the hotel's financial position . . . as well as to improve operational efficiencies, I recommend that we again outsource the housekeeping department to [HSS], a reputable contract

> labor company that the hotel has worked with on a limited basis since 2008.

ROA.53-54; and *see*, (Ex GC 19). [4]

With reference to the memo's comment on "improv[ing] operational efficiencies" (phrased as "better operational procedures" in the second memo, at (Exhibit GC-2), Mr. Studer, on cross-examination, placed the focus precisely on "being able to drive better guest satisfaction scores … being able to get a labor pool to be able to perform the duties we need day in, day out to be able to drive guest satisfaction scores." (Tr., p. 481); *see also*, testimony by Holliday, the head of HSS. (Tr., p. 460) ("the whole point of [his] company's performance is . . . to improve guest scores for the hotels" that HSS services).

Company president Sharkey, in his reply to Mr. Mengiste's memo, focused in the same manner on the guest-satisfaction scores:

> I ... agree that it is time to address this problem. We cannot allow service scores to be this low or to continue to suffer from staffing problems. This has gone on too long and we must make a change immediately. Reach out to HSS and make the necessary changes tomorrow.

ROA.53.

[4] There was another memo on the same subject by Mengiste to Sharkey, also dated June 28. (GC-19). The record is not clear why there were two memos. Nonetheless, the two memos are nearly identical in substance.

The administrative law judge ("ALJ"), in support of his finding that Remington was motivated by union avoidance, characterized Remington as having engaged in a "sudden quest to contract out the housekeeping duties." ROA.14. This characterization, though, is plainly at odds with the undisputed facts, including, first, the Board's finding quoted above that the company had actually been engaged, since "mid-June," in the exploration of "the possibility of outsourcing its housekeeping work." Second, the company president's decision on June 28 marked only the beginning of a protracted review, analysis, negotiation and planning process that stretched over another 55 days, from June 28 to the day HSS begin its work in the hotel, on August 21 (the contract with HSS was signed on August 16). ROA.1. During that 55-day period, Remington also held discussions with other outsource providers, including Jani-King, which made a written proposal, (Exhibit R-12), and two other providers in Pennsylvania and in Chicago. (Tr., pp. 650-51). These facts – concerning the deliberate, painstaking nature of Remington's handling of the process that led to the August 21 outsourcing – are not in dispute. Indeed, the ALJ, before making his flippant reference to a so-called "sudden quest," more accurately characterized the negotiations as "extensive," particularly during a four-day period in mid-July (and yet, no contract was reached and signed until August 16). ROA.13.

The ALJ also, in reaching his conclusion that Remington was motivated by union avoidance, declared in a footnote that the supporting reference in Mengiste's memo to "improv[ing] the financial position" was a "bogus" statement – *i.e.*, a pretextual invention, concerning a reason to outsource. ROA.6 and footnote 7 at ROA.29.

Mr. Studer addressed this statement by Mengiste in testimony, pointing first to overtime savings (which Mengiste's memo pointed to as well, with specificity): "If we have the adequate amount of staffing, we can minimize the amount of overtime which absolutely . . . helps us from a financial perspective." (Tr., p. 483). Overtime was indeed a pressing issue at the hotel, both in terms of cost and work quality, as Housekeeping Director Blanca Dunleavy affirmed. Room attendants, she testified, "were doing more hours, so they would stay late. We overworked them." Tr., p 689. Mengiste, addressing this concern in his memo, stated his belief that HSS had the "resources to provide necessary staffing levels on short notice to meet business demand," and thus avoid overtime costs. ROA.53-54.

Mr. Studer acknowledged that outsourcing *can* be "more expensive," perhaps even more often than not. He stated also, however: "It may not always be." (Tr., p. 613). The greater point, though, as he went on to explain, is that even if the cost is higher, the aim and purpose is to generate a better return. Specifically, in situations where "we're having challenges like we were in this case, with guest

satisfaction levels and . . . how the operation is performing," any adding of costs attributable to outsourcing constitutes an investment in fixing those problems. If successful, the investment will serve to "improve the financial position," as noted by Mengiste's memo. (Tr., p. 614).

Moreover, it must be noted, the June 28 memo was simply an initial analysis, and was made prior to the investigation and negotiation that followed. Mengiste's memo, for example, referred to HSS's rate of $12.60 per hour, which had apparently been the rate in 2011, at the time of takeover. Mengiste expressed simply the hope or possibility of negotiating a "reduced rate." However, as reflected in the testimony of Studer and the head of HSS (Holliday), when the companies got down to the brass tacks of negotiation, HSS "was insistent" – as the Board found – that a higher wage and benefit rate was necessary to "attract suitable and sufficient employee applicants." ROA.13. Remington "tried to negotiate for a lower rate," Studer testified. He recalled also that Holliday "adjust[ed]" his demand "down slightly from where we started." (Tr, p. 633). However, at the end of the day, the parties settled on a notably higher rate of $14.84. (Tr., pp. 630-31). Mr. Studer went on to testify:

> But the reason we were willing, in this case, to pay more was . . . to have access to a larger pool of associates, one that we were . . . I'm going to use the word hopeful, very hopeful that they were going to be able to improve our satisfaction level to get it to that top fifty percent and top twenty-five percent of the brand that we were looking for.

(Tr., p. 633). He stated further, in explaining this 'hopefulness,' that not only was the higher rate intended to generate a "consistent pool" of "more employees," (Tr., p. 634), the intent was to enable "get[ing] the best, the right type of individual." (Tr., p. 632).

Staffing was indeed a difficulty at the Hyatt Regency. Housekeeping Director Blanca Dunleavy testified, simply, she "didn't have enough staff to cover the rooms," and that room attendants, consequently, had to clean more rooms per shift (basically, 16 or 17 rooms a shift, rather than the standard 15). (Tr., pp. 688-89). In addition, as noted above, she testified "[w]e overworked them" with overtime. *Id*. The hotel was forced also to deploy the public-area cleaners to clean the guest rooms. "Instead of having two people cleaning [the public spaces] . . . I was having just one person running around doing [those areas]." In consequence, she said, "the quality of the public areas was in shame." (Tr., p. 690).

* * * * *

Remington did not outsource the entire housekeeping department – only the *staffing* of the department. The employees were placed on the HSS payroll, and HSS had direct control over wages, benefits, taxes and employee record-keeping. Remington, however, continued to manage the department and supervise the employees. Specifically, the hotel's Director of Housekeeping, Blanca Dunleavy – who reported directly to the hotel General Manager – held this function before and

after HSS's August 21 arrival. Similarly, there were two housekeeping supervisors employed by Remington – Percida Rosero and Yohena Borrero – who continued to perform their same functions (room inspections for quality control, work and location assignments, and other more administrative duties).

On August 20, Remington informed the housekeeping staff that HSS would be taking over the department. All employees (with one exception [5]) were invited to apply. HSS was present in the hotel to begin the process of taking applications. HSS required the employees to submit to E-Verify, along with a drug test and a background check. As a consequence of these conditions, a certain significant number of the applicants – possibly as many as 15 – were not hired by HSS. (Tr., p. 73). The complaint in this case did not allege that either HSS or Remington unlawfully discharged, or unlawfully refused to hire, the 15 or so employees who were not hired by HSS. [6]

August 21 was the first day of employment from those employees who were hired by HSS.

[5] There is no allegation in this case, or any evidence, that the exclusion of this one employee was discriminatorily unlawful.

[6] HSS was originally named as a respondent in this case. During the course of the hearing, on March 19, 2013, HSS reached a separate settlement with the Board and was dismissed from the case.

C. The Union's Organizing Campaign During the Late Spring and First Half of the Summer of 2012.

As noted in the Introduction, in late April of 2012, a lone organizer with the charging-party Union – Jose Vega – began making occasional visits to the hotel, and started talking with employees. He first visited the hotel in mid-April, for reasons unrelated to organizing. (Tr., pp. 103 & 109). While there, meeting a colleague who was a guest booked into a room, he chanced to converse with some housekeepers in the hallway. *Id.* Thereafter, later in April, he began to make visits to the hotel on an approximately weekly basis. (Tr., pp. 102 & 109).

The organizing effort pursued thereafter by Vega was of a low-key, minimalist nature. There is nothing in Vega's testimony, or anywhere else in the record, suggesting that anyone other than Vega was involved. The organizing was not done in a publicly open or aggressive manner; for example, Vega admitted he did not position himself in the parking lot or at the property entrances, in order to solicit employees on their way into work or at shift-end. (Tr., p. 110). Instead, he would walk into the hotel, posing as a guest, and attempt to speak with employees, particularly housekeepers on the guest floors, while busy cleaning rooms. *Id*. He was careful not to disclose his identity and true purpose, and there were no confrontations with any managers or supervisors. On no occasion did he come "face-to- face with any manager, who from [Vega's] perspective, knew who [he

was] or what [he was] doing." *Id.* He admitted the stealth he practiced was "by design," as he "didn't want management to know that [he was] inside the hotel trying to organize." *Id*. Further, he instructed the employees with whom he spoke not to disclose who he was or his purpose; to "keep it under your hat." (Tr., p. 111).

During his occasional visits, he handed out business cards. However, no one responded by calling him until "May or June 2012," when he was contacted by a housekeeper, Victoria Flores, who wanted to meet. (Tr., p. 103). Although Vega was not precise when identifying the timing of Flores' call, it would appear to have been in late May or early June, as the meeting that was scheduled was set for early June. That meeting, however, never took place. The first meeting Vega held with any employees, at a Taco Bell, was not held until July 4. (Tr., p. 104). "Six to eight" employees attended, but only four union-authorization cards were signed – these were the first such cards signed by any employees. (Tr., pp. 104 & 107). Only seven more cards were signed as of July 11, for a total of 11 in the bargaining unit of 120. [ROA.13].

D. Evidence Relied Upon by the Board in Finding that Remington Had Knowledge of the Organizing Effort Prior to its June 28 Decision to Re-Outsource Housekeeping.

The Board found that Remington's "knowledge of and animus toward the union activity," which it found motivated the June 28 decision to re-outsource the

housekeeping department, "are established by the two unlawful interrogations that occurred in May and early June." ROA.2. The Board pointed to no other evidence supporting its finding of knowledge motivating the June 28 decision, nor could it. As the complaint reflects, most of the allegations of unlawful interrogation and questioning occurred in August and September, after the Union filed its first representation petition. ROA.33-34 (see, paragraphs 13 through 17). There was only one allegation of an incident in June, and one allegation of an incident in "late July." There are no allegations of any incidents in May. *Id.*

The two incidents of alleged unlawful interrogation, which the Board did rely on, are the following:

- A conversation between housekeeping director Andrew Arpino and Veronica Flores. Flores was asked if she "knew anything about a union," and Flores stated, "[S]he didn't know anything." (Tr., pp. 123-24). Nothing else was asked, and Flores volunteered no information. As for the timing of this conversation, the ALJ in his decision acknowledged that, "Flores was not at all that certain as to when it occurred." He went to state, however, that "from the context of her testimony it most likely occurred shortly before June 10." ROA.12. [7]

[7] The testimony of Flores was hopelessly confused and inconsistent, especially as to timing. Prior to the hearing, Flores gave two affidavits to the Board's investigators – on September 7, 2012 (within weeks of the events she described therein) and another one on

- A conversation between housekeeping supervisor Percida Rosero and Ninfa Palacios. Ms. Palacios testified Rosero, "only asked whether I was asked to participate in a meeting . . . about the Union." ROA.40. Ms. Palacio testified "she knew nothing" about it, and testified further this was "the first time [she] learned about the union." ROA.41. Palacios placed this conversation in the month of May. Her recall of this timing was as equally uncertain as that of Flores, if not more so. [8]

E. Remington's Decision Not to Hire the HSS Employees on October 19.

On August 21, the day HSS hired the housekeeping employees, the charging-party Union filed its first "RC" petition for an election. The proposed bargaining/voting unit consisted of housekeeping employees, together with bellmen, drivers and building maintenance employees. Remington was named as

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December 20, 2012. In the first affidavit, she testified the conversation with Arpino occurred in *mid-July*. (Tr., pp. 136-138 and 155-56). In the December affidavit, she inexplicably changed the *timing* of the incident to mid-June. (Tr., p. 159). Both affidavits testified to only a single conversation. At the hearing, Flores changed her testimony yet again, by testifying for the first time to a *second* conversation with Arpino. Her attempt to recall the timing of these conversations was all over the place, ranging between April and July. *See*, (Tr., pp. 124, 127-28, 168).

[8] Palacios responded it occurred "more or less on the first days of May." When asked for the basis of her recall, she responded: "Because I was preoccupied with my son's graduation and I had to attend to it the *next day*." ROA.39 (*emphasis added*), which later she said occurred on June 2. The ALJ picked up on the inconsistency that the "first days of May" would not include the "next day" prior to June 2. In explaining the inconsistency to the witness, the ALJ effectively 'coached' the witness to fix her story, ROA.40, upon which Palacios did an immediate about-face, stating, "Yes, a *month* prior [to the son's graduation]." *Id.* (*emphasis added*).

the employer. The petition was amended on September 11, adding HSS as a joint employer. A little over a week later, HSS gave a 30-day notice to Remington that it was terminating its contract. True to its notice, HSS departed on October 19. At approximately the same, the election petition was amended again, dropping HSS as the employer.

The ALJ accurately summarized Remington's actions following September: "Remington went out and recruited an entirely new housekeeping staff and trained them at another hotel." ROA.15. On October 19, the new staff replaced the HSS staff.

However, within a week or two following October 19, Remington began making a series of unconditional offers to hire back all of the displaced employees. The first two offers included an employee who was a known union supporter, Estella Cabrera; the other employee was a close friend of Cabrera.[9] Thereafter, on December 6, the hotel sent letters and application forms to all of the former housekeeping employees, inviting them to apply. (Tr., pp. 780-86); and Exhibits R-1 through R-4 and R-37 through R-38).

Following that, individual unconditional offers were made to *all* of the displaced employees as openings occurred, and as found by the United States

[9] Cabrera testified she had verbally communicated her union support to the hotel's director of human resources, Osiris Arango. (Tr., p. 215). Arango extended the two women the offers because "they were good employees and they had been in the hotel many years." (Tr., p. 718).

District Court in *Paulsen ex rel. NLRB v. Remington Lodging,* 2013 WL 4119006, *aff'd in material part*, 773 F3d 462 (2d Cir. 2014) (denying the Board's request, for a 10(j) injunction, to require Remington make an immediate, *en masse* offer of reinstatement, instead of continuing its series of offers as openings became available). By September 2013, less than a year later, 14 of the 37 displaced employees had accepted an offer and returned. [10]

* * * * *

The factors that motivated the June 28 decision to outsource the housekeeping department did not change following the arrival of HSS on August 21, or following September 19 when HSS gave its 30-day notice to terminate the contract. Remington, that is, remained vitally interested in doing everything within its power to improve the hotel's housekeeping functions, as this was essential to moving the guest-satisfaction scores to the ranges needed.

The decision to bring in HSS to staff and run the department, unfortunately, was unsuccessful, as General Manager Rostek testified. (Tr., pp. 73-74) ("we had a lot of issues"). First, as a consequence of HSS's requirement to E-Verify all employees, as well as drug-test and perform a background check, a certain

[10] The district court found, at *slip op*. *1, that "37 employees" were eligible for reinstatement. At the time of the issuance of its decision, "only 8 employees are waiting for a position to open . . . and . . . it is extremely likely that these remaining 8 employees will receive positions over the next 60 days." Subsequently, on October 3, 2013, Remington reported to the Court that all of the offers had been made (doc. no. 35).

significant number – possibly as many as 15 – were not retained by HSS. *Id.* Second, HSS then failed, contrary to their promises and reputation, to bring on board a sufficient number of replacements. For example, on September 3, 2011, the housekeeping department needed 17 new housekeeping employees. (Exhibit R-33). One week later, the situation was virtually unchanged – the need for housekeepers stood at 15 – leading H.R. Director Osiris Arango to complain in an email to HSS. (Tr., pp. 768-69; (Exhibit R-28). The hotel was busy, and was not only short-handed, but had to assume the task of training the HSS new-hires. *Id.* HSS had promised to provide a trainer. However, as of September 11, that had not happened yet. *Id.* A trainer was then promised to arrive on September 17. He showed up late, and one week after that HSS pulled him out of the hotel. (Tr., p. 773).

There were other problems as well, including HSS's failure to issue paychecks in the correct amounts. (Exhibit R-29 and R-30); and (Tr., pp. 770-71). Another recurring problem was the appearance of new-hires with no one from HSS in the hotel available to process the entry paperwork and start them on their duties. (Exhibit R-34); and (Tr., pp. 776-777). Yet another problem was the appearance of new-hires "who showed up and left" – these persons, Rostek testified, "basically told us [they] didn't know . . . this was a housekeeping job and left." (Tr., p. 776); and (Exhibit R-33).

On September 20, Mengiste reported the problems identified above, by email, to Remington's second-in-command Evan Studer. (Exhibit R-14). He concluded this email, by observing "we brought HSS to the property . . . to help us improve our guest satisfaction scores," but that the "number of guests *dissatisfied* with our housekeeping service [has] continued to rise." Mr. Mengiste presented the numbers in this email, showing the rise in *dissatisfaction* from August 20 to September 20: An increase from 26.2% to 42.1% ("bathroom not clean"); an increase from 21.4% to 31.6% ("mold and mildew present"); an increase from 9.5% to 10.5% (room "not clean[ed] daily"); and an increase from 47.4% to 71.4% ("carpet not cleaned"). See also, testimony by Studer, at (Tr., p. 658).

Executive Housekeeper Blanca Dunleavy testified to the impact of HSS's failure to provide a promised supervisor:

> Me and my two supervisors [Remington employees] . . . between the three of us, we will have to take care of the sign-in sheet, the payroll, and the whole staffing. And instead of . . . inspecting rooms or making sure the quality of the rooms [is right], pay attention to the girls . . . we're spending time doing this job that was supposed to be done by the HSS Supervisor.

(Tr., pp. 690-91).

* * * * *

Following the September 19 notice that HSS was terminating its contract, Mr. Studer participated in discussions that led to the ultimate decision to replace

the staff: "We had lost a lot of confidence in what was taking place with HSS and the proper staffing and oversight management . . . a lot of confidence in general that was lost with them *and the associates* [*employees*] that were working for them." (Tr., pp. 498 and 638) (emphasis added). The loss of confidence in the employees themselves is understandable. Housekeeping Director Dunleavy testified these employees "were not really that happy," and "they weren't really that receptive" to direction when "trying to give [them] feedback with the [cleaning of] rooms." (Tr., p. 693). "They weren't really taking any advice . . . from inspections, from the supervisor's point, they weren't really taking any." *Id; See also,* (Tr., p. 507) (Studer: "We had lost a great deal of confidence in HSS *and their staff* that was there") (emphasis added).

This concern, by turns, led to the worry that a substantial number of the employees would leave when HSS departed, on October 19. "[We] didn't have the confidence level that we were going to have a staff or employee pool there on the transition date . . . [There was] a genuine concern as to were we going to have anybody there the day that we took over [on October 19]." (Tr., pp. 510 & 526); *and see*, (Tr., p. 534) (Rostek: a general manager's "worst nightmare").

A serious concern existed also that HSS would take employees with them. *First*, in this regard, HSS's business model is built on having multiple hotels in a geographic area, so as to move employees around. (Tr., p. 635). *Secon*d, although

the clause in the HSS contract barring Remington from hiring its employees had been waived by HSS, ROA.15, there was nothing in the contract to *prevent* HSS from taking employees to another hotel. This loomed as a distinct possibility, based on the fact – *third* – that it was understood by all, as the head of HSS (Holliday) acknowledged, that it was actively going after other hotels on Long Island, including the nearby Marriott. (Tr., pp. 458-459); *see also,* (Tr, pp. 636-37) (Studer: When negotiating with Holiday, the parties discussed HSS's "objective to set up an office there to handle us and potentially pick up other accounts out on the island"). HSS, after all, previously had an office on Long Island, and was therefore aware of the resources and opportunities the area presented. And thus, as October 19 approached, and as decisions had to be made, it was completely unknown whether HSS would have other properties or not, and whether HSS would, therefore, solicit the hotel's employees to another hotel. The possibility existed, as well, that HSS could withdraw the waiver. Mr. Studer testified that Holliday never indicated, at any point, that HSS was abandoning its objective of seeking additional hotels in the area. (Tr, p. 637).

This latter concern was held by all of management at the hotel. Housekeeping Director Blanca Dunleavy: "We heard that HSS was having a contact with Marriot across the street so we thought that they might take the whole

staff with them to work with Marriott. So we worried once the contract end, we was going to have no staff." (Tr., p. 693).

For the reasons discussed above, and in particular the further decline in satisfaction scores, Remington made the decision that bold action was necessary. The company determined that it was necessary to take complete control of the housekeeping function, through a vigorous recruiting effort of hiring anew and then training properly, while also making positions available, as openings occurred, for those employees who wanted to work there.

This plan worked. The hotel in the first quarter, as discussed in section B, above, saw its scores rise significantly. Housekeeping Director Dunleavy testified: "I never received the scores that high before. The rooms are really clean, they are really clean through and everything. So it is a big impact in the hotel . . . I do have employees that I am very proud of my whole department." (Tr., p. 693). Though Ms. Dunleavy did not play a role in the decision to hire the new crew, when asked if she "support[ed] that decision once it was made," she testified: "About bringing a new staff, yes, I did. Yes, I completely support the decision," and noted also the importance of "making sure that we have the right staff." *Id.*

F. The Discharge of Margaret Loiacono.

Margaret Loiacono was hired on September 18, 2012, (Exhibit R-19), as a "lobby ambassador." The basic function of her job, as the name implies, was to

greet guests on arrival in the lobby, and to wish them well in the lobby upon departure. In addition, she was to function as a traditional hotel concierge, offering assistance for guest needs and information. The job is in fact a critical one for a high-end hotel like the Hyatt Regency, and was particularly critical to this hotel given its low guest-satisfaction scores, discussed above. By delivering a personal touch or an act of helpfulness – by "wowing" the guests, as both she and hotel General Manager Rostek testified (Tr., pp. 357 & 809) – an effective lobby ambassador can make the difference between an otherwise mediocre stay, and one that delivers a return guest.

The facts concerning Ms. Loiacono's discharge are undisputed. (Tr., pp. 353-55) (Loiacono) and (Tr., pp. 734-36) (Rostek). On Sunday, December 30, 2012, at 11:30 a.m., as spelled out in the disciplinary documentation, (GC-8), Ms. Loiacono traveled downstairs to the housekeeping office to find out whether a requested refrigerator had been delivered to a guest (claiming she was unable to reach the supervisor on the hotel's radio). She was seeking, therefore, a simple 'yes or no' answer, and admitted she was told – without delay – that, yes, the refrigerator had already been delivered. She then engaged in a discussion that she admitted lasted "ten minutes or so" related to an informational pie chart – showing employee wages and benefits – which had been distributed by management to the employees in connection with the then-ongoing union-election campaign. During

the course of that discussion, Loiacono was critical of its accuracy and of how information was presented in the pie chart (she was not critical, though, of management itself or of management's position with respect to the upcoming union vote).

Consistent with this last statement of fact, it is undisputed Ms. Loiacono was not a union supporter, and never presented herself as one. She admitted that in a conversation with General Manager Rostek and other employees, she "made comments to indicate . . . that [she was] on his side" with respect to the "opinions that he was expressing about the union," and further stated in this conversation that "it would have to be a big union to get benefits," and that she was "not for the union or against the union, but that [she] would probably be non-union." ROA.43.

Loiacono was terminated within her 120-day probationary period, on January 2, 2013 (GC-8); *see also*, (R-7) (employee handbook provision describing the 120-day "Orientation Period"). Loiacono admitted her awareness of the applicability of the probationary rule. (Tr., pp. 376-77).

Loiacono had also been previously reprimanded for displaying a negative attitude. She admitted the reprimand was "legitimate." ROA.42. This was a matter of no small consequence given the nature of her position. (R-5). (job description refers to the lobby ambassador's role as the hotel's "lead cheerleader," and that "it is envisioned that you will enjoy interactions with our guests").

Loiacono's discharge was given consistent treatment with other disciplines recently handed out in the hotel. Mr. Rostek testified to disciplines given to two other employees – Ryan Schipf and Robert Keenan – who committed a similar infraction (ignoring guests in the lobby, while engaged in a sports discussion). (Tr., pp. 737-46). Mr. Schipf, who was in his 120-day probationary period, was terminated. Mr. Keenan, a longer-term employee, was given a written warning but not discharged.

VI. SUMMARY OF THE ARGUMENT

The June 28, 2012 decision to outsource: Petitioner Remington had legitimate, non-discriminatory business reasons to outsource the staffing of the housekeeping department at the Hyatt Regency Long Island hotel. The guest-satisfaction scores were ranked at the very bottom of all Hyatt-branded hotels, and the housekeeping department was failing badly, due primarily to an inability to recruit staffing.

Remington's executives began discussing the outsourcing option as a solution to this problem in mid-June of 2012. On June 28, the company's president in Dallas made the decision to outsource. Thereafter, extensive negotiations were pursued with the outsource contractor, Hospitality Staffing Services (HSS). The current employees were invited to apply, and on August 21, HSS hired all those

meeting HSS's application requirements. Although the staffing was outsourced, Remington's managers continued to manage and supervise the department. Remington became a joint employer with HSS.

The Union's organizing effort began several weeks prior to the June 28 decision. This campaign involved a lone organizer who made only occasional visits to the hotel, meeting secretly with only a small number of employees. The organizing effort was peculiarly secretive and low-key. The first four signed union-authorization cards (out of a 120-employee unit) were signed on July 4, a full week after the decision to outsource was made.

The Board's General Counsel failed to prove that Remington's management team in the hotel had knowledge of the organizing effort. The only evidence relied upon by the Board, in erroneously finding it did have knowledge, were two interrogations. Nothing was revealed in these interrogations, and the interrogators actions and comments, in the context of the circumstances, fell far short of establishing actual knowledge on Remington's part. The Board erred also in failing to take account of the fact that Remington purposefully remained an employer (as a joint employer), and therefore did not seek to avoid a duty to bargain with a union.

Section 8(a)(3) of the Act, by the plain language of the statute, and as applied by the Supreme Court, only prohibits discrimination which discourages or encourages union membership. The actions of Remington were not aimed at

discouragement, were not of the type to have likely caused discouragement and, in fact, did not cause discouragement.

Margaret Loiacono: Ms. Loiacono was not a union supporter, a fact which she admitted and which was known to the hotel's management. Ms. Loiacono was still in her 120-day probationary-hire period when she was discharged, for abandoning her work post. She also had a previous disciplinary action. The discharge was not discriminatory – evidence was introduced of employees disciplined similarly under similar circumstances.

During the abandonment of her post, she engaged in a conversation with another employee, in which she expressed criticism of some union-election campaign material issued by management. However, the ALJ found under the circumstances – a finding not rejected by the Board – that her actions in this regard did not constitute (as a legal matter) "concerted activity" protected by section 7 of the Act. The Board erred in nonetheless finding a violation of the Act. The cases relied upon by the Board are distinguishable. Moreover, in the absence of a finding of an exercise of right protected under section 7, a finding of a violation of 8(a)(1) is precluded.

VII. ARGUMENT

A. Standard of Review

The court reviews NLRB decisions *de novo*. *Flex Franc Logistics, L.L.C. v. NLRB*, 746 F.3d 205, 207 (5th Cir. 2014). The court will only uphold an NLRB decision if it is reasonable and "supported by substantial evidence on the record as a whole." *Tri-State Health Serv., Inc. v. NLRB*, 374 F.3d 347, 352 (5th Cir. 2004). The Appellate Court is not left "merely to accept the Board's conclusions, the Court must be able to conscientiously conclude that the evidence supporting the Board's determination is substantial." *Brown & Root, Inc. v. NLRB*, 333 F.3d 628, 633 (5th Cir. 2003). Substantial evidence is "such relevant evidence as a reasonable mind would accept to support a conclusion." *J. Vallery Elec, Inc. v. NLRB*, 337 F.3d 446, 450 (5th Cir. 2003). It is well established that "suspicion, conjecture, and theoretical speculation register no weight on the substantial evidence scale." *NLRB v. Mini-Togs*, 980 F.2d 1027, 1032 (5th Cir. 1993); *TRW, Inc. v. NLRB*, 654 F.2d 307, 3132 (5th Cir. 1981). As such, appellate review of an NLRB decision is "more than a mere rubber stamp of the decision." *Asarco, Inc. v. NLRB*, 86 F.3d 1401, 1406 (5th Cir. 1996).

The Court reviews NLRB "legal conclusions *de novo.*" *Dixie Elec. Membership Corp. v. N.L.R.B.*, 814 F.3d 752 (5th Cir. 2016). NLRB conclusions of law are only entitled to deference on review if they have a "reasonable basis in

law and are not inconsistent with the NLRA." *Valmont Indus., Inc. v. N.L.R.B.*, 244 F.3d 454, 464 (5th Cir. 2001). Appellate courts must ensure that the board "adheres to its own standards" of law. *Mobil Expl. & Producing U.S., Inc. v. NLRB*, 200 F.3d 230 (5th Cir. 1999).

B. The Board's Finding of an 8(a)(1) and (3) Violation, Relating to the June 28, 2012 Decision to Re-Outsource Staffing of the Housekeeping Department, is Not Supported by Substantial Evidence and Correct Law, and this Court Should Approve and Adopt the Better-Reasoned Dissent.

The evidence reviewed above in section V.B establishes that Remington, in the summer of 2012, had legitimate, non-discriminatory business reasons to once again outsource the staffing of the housekeeping department. This evidence is not contradicted by any other evidence in the record.

The unremitting decline in the "guest room" component of the guest-satisfaction scores – which ties directly to satisfaction with the cleanliness and service quality of the housekeeping department – presented Remington with a genuinely serious problem. As shown above, the guest-room component score – measured against an average benchmark of "50" – stood at "20.4" in March, and then dropped into the single digits in April, where it remained all the way through August. As shown also, the hotel's *overall* guest-satisfaction ranking, among the 142 Hyatt-branded hotels, ranged between 'next-to-last' and 'fourth-worst.'

The Board's dissenting member correctly reasoned that when a company "such as Remington" is faced with having to manage a difficult and demanding operation, in the nature of a "full service Hyatt hotel," finds also that it is "confronted with ongoing low customer satisfaction scores . . . *more evidence is not needed to establish credible justification* for taking action, including the subcontracting implemented by Remington here." ROA.27, at footnote 15 (emphasis added).

The ALJ's findings and conclusions with respect to this business decision, as adopted by the Board's 2-1 majority, is riddled with error and insupportable reasoning. The ALJ, for example, in his footnote 7, declared several of Mengiste's statements in his June 28 memo – one of which stated, as a reason for re-outsourcing, "to improve the hotel's financial position"– as "somewhat bogus," and even "naïve." The ALJ was completely out of his depth in making such an assertion. As shown above in section V.B, by the testimony of executive vice president Evan Studer, the ALJ failed to understand the meaning and significance of Mengiste's statement: (a) he failed to understand the financial impact of reducing overtime costs, which Mengiste legitimately perceived HSS could deliver by providing adequate staffing; (b) he failed to understand the very nature of what Remington was seeking to accomplish, by its 'investment' in (what turned out to be) the higher cost of outsourcing – *i.e.*, an investment seeking a greater 'return' in

guest satisfaction that leads, in turn, to higher revenue generated from satisfied guests who return to the hotel and will recommend it to others; and (c) he failed to understand the preliminary nature of Mengiste's June 28 analysis, which had been expressed *prior* to the investigation and negotiation that would follow over the next 55 days, coupled with (d) his failure to understand the undisputed statement by Studer that outsourcing does not *always* result in a higher cost. The dissent reached the same conclusion – with respect to this latter point – stating: "[The ALJ's] criticism fails to acknowledge that countless instances of subcontracting result from *an expectation* that a contractor, for several reasons (*e.g.*, specialized expertise, economies of scale, experience), can provide services at a lower cost than that incurred by the contracting employer" (pointing to *Fibreboard Paper Products v. NLRB*, 379 U.S. 203, 206-07 (1964), as one such example). ROA.27 (footnote 18; *emphasis added*).

The dissent similarly found the ALJ to be "simply wrong" in "discount[ing]" Mengiste's June 28 expression of a tactical concern tied to the impending implementation of the Affordable Care Act (ACA). The ALJ had dismissed Mengiste's concern as "somewhat bogus," and – in support of this – the ALJ stated the ACA, as of June 2012, was not going to be effective "for at least a year and would not really affect an employer that already was providing health insurance to its employees." The dissenting Board member correctly reasoned, pointing to

reliable news media sources: "One need not reconcile the divergent views that exist regarding the ACA to recognize that the [ALJ's] analysis here is simply wrong: as of June 2012, *countless employers* – including those that already provided health insurance coverage – had profound concerns about the ACA's impact on future cost increases." ROA.27, (footnote 18; *emphasis added*).

With respect to the other side of the coin – Remington's alleged knowledge of union activity by its employees, and the possibility this knowledge was the true motivator in Remington's decision to re-outsource – the dissent provides, again, the better-reasoned position. The dissenting member noted first:

> After June 10 – the date by which the [ALJ] found Remington must have known "that a union agent was soliciting employees inside the hotel" – a handful of conversations about union activity took place between employees and Director of Housekeeping Andrew Arpino or Housekeeping Supervisor Percida Rosero.

He noted further, however: "[B]ut there is no evidence that Arpino or Rosero knew or were advised that *any employee* supported the Union or engaged in union activity." ROA.6 (emphasis in original). The dissent observed, also: "In the June 10 conversation between Arpino and employee Veronica Flores, Flores was asked if she "knew anything about a union," and Flores stated, "[S]he didn't know anything." *Id.* Similarly, as shown in section V.D, above, Palacios testified Rosero, "only asked whether I was asked to participate in a meeting . . . about the Union," and that Palacio responded "she knew nothing" about it, testifying further that this

conversation was "the first time [she] learned about the union."

This testimony must also be viewed in the context of the evidence of the low-key, secretive and non-aggressive nature of the organizing effort, as shown above in section V.C of this brief. As this evidence shows, no union-authorization cards were obtained until July 4, and the number of signatures as of July 11 amounted to less than 10% of the bargaining unit of 120 (11 signatures). Moreover, this limited card-signature success occurred *after* the decision had been firmly made by Remington's president, on June 28, to re-outsource housekeeping back to HSS.

Prior to June 28, as found by the Board, there were only two conversations – between Arpino and Flores, and between Rosero and Palacios – which could possibly have placed Remington's executives (in Dallas and Jacksonville) on notice of employee involvement in an organizing effort. The dissenting member is correct in stating:

> I agree that at least one of these conversations involved coercive interrogation in violation of Sec. 8(a)(1). However, it is an entirely different question whether the evidence reveals that Remington knew that any housekeeping employee supported the Union or engaged in union activities.

ROA.26 (footnote 13). He explained, further, "simply as a matter of logic, asking questions cannot per se establish knowledge of what is asked about, since the usual purpose of asking questions is to learn something one does not already know," and

stated further:

> The cases cited by my colleagues do not hold otherwise, as the Board in each case did not find knowledge based *solely on interrogations* but rather relied on *other circumstantial evidence as well*.

Id. (emphasis added, and citing to and explaining *Hartman & Tyner, Inc. d/b/a Mardi Gras Casino and Hollywood Concessions,* 359 NLRB no. 100, slip op. at 2 (2013); *Evenflow Transportation*, 358 NLRB 695, 697 (2012); and *McLean Roofing*, 276 NLRB 830, 833 (2015)).

The Board's 2-1 majority concluded that the two "interrogations demonstrate, at the very least, a suspicion that employees were engaging in union activity," and – citing to *Kajima Eng. & Constr., Inc*., 331 NLRB 1604 (2000) – concluded this was sufficient to establish the requisite knowledge element. ROA.24 (Board decision footnote 7). "But in *Kajima*," the dissent correctly stated, it was clear that the employer ". . . already knew that its employees had engaged in union activity [as an election petition had already been filed]." ROA.26 (dissent footnote 13).

"[E]ven assuming Remington suspected employee union activity when it entered into the subcontract with HSS," the dissent correctly concluded, "I believe the evidence does not support a finding that the subcontracting decision was motivated by antiunion considerations." ROA.6. The dissent, here, correctly relied upon the evidence summarized above, establishing a legitimate business need to

once again outsource, and correctly coupled that evidence with the following:

> [S]everal uncontroverted facts, which my colleagues disregard or discount, warrant emphasis. To begin with, housekeeping operations were *already* subcontracted to HSS when Remington took over management of the hotel. Although Remington decided [in December 2011] to employ the housekeeping employees directly, it accomplished this *by hiring the housekeeping employees and their supervisors previously employed by HSS*. Moreover, its subsequent decision [on June 28, 2012] to reinstate the outsourcing arrangement was not unprecedented. Although Remington's usual practice has been to directly employ housekeeping personnel, it has subcontracted some functions in the past, including the housekeeping function. See judge's decision at fn. 2.

ROA.6 (emphasis by the dissent).

Moreover, the dissent is certainly correct, in the balancing of rights under section 8(a)(3), to emphasize – as the Supreme Court has instructed – the need for protection of an employer's right to manage its business, citing to and quoting *American Shipbuilding Co. v NLRB*, 380 U.S. 300, 311 (1965):

> *It has long been established that a finding of violation under this section will normally turn on the employer's motivation*. . . . But we have consistently construed the section *to leave unscathed a wide range of employer actions taken to serve legitimate business interests in some significant fashion, even though the act committed may tend to discourage union membership*. . . . Such a construction of § 8(a)(3) is essential if due protection is to be accorded the employer's right to manage his enterprise.

ROA.5 (emphasis by the dissent).

The Supreme Court has emphasized, as the dissent correctly observed, that

Section 8(a)(3) prohibits discrimination only to the extent that such conduct tends to "encourage or discourage membership in any labor organization." *American Shipbuilding,* 380 U.S. at 311 ("Under the words of the statute, there must be both discrimination and a resulting discouragement of union membership"); and *Radio Officers' Union v. NLRB,* 347 U.S. 17, 42-43 (1954) ("The language of § 8(a)(3) is not ambiguous). The question must therefore be asked, in the event of a finding of discrimination, whether such discrimination in fact caused or resulted in a discouragement of union membership. The answer, here, is plainly 'no.' The dissent explained:

> Here, the record fails to support an inference that the outsourcing of housekeeping functions to HSS tended to "encourage or discourage" union membership. Virtually everyone remained employed, they received higher wages (at HSS' insistence and following negotiations between HSS and Remington), the employees continued to perform the same work in the same location, and they had the same supervisors.

ROA.5.

This last point by the dissent is of particular importance, as it is plainly the case, under the evidence here, that Remington chose to only outsource *the staffing* of the housekeeping department. It did so, as the dissent correctly noted, because "it was reasonable for Remington to believe that HSS, in the business of providing housekeeping staffing services, would have greater expertise and success dealing

with these issues, particularly in conjunction with the substantial wage increases that HSS implemented." ROA.27 (dissent footnote 17). Remington, however, continued to manage the department. The housekeeping director and the two housekeeping supervisors below her – Remington-employed managers both before and after August 21 – remained and managed this department, plainly establishing a joint employer status. This fact, as the dissent correctly states, "further undermines the finding that the outsourcing constituted 'discrimination' that tended to 'encourage or discourage' union activities." ROA.5. In response to the majority's assertion "that the employees would not have known that Remington would still have a duty to bargain if the employees selected a union," the dissent correctly observed:

> However, the Union's initial representation petition (Case 29-RC-087706) identified Remington as the employer, and the second representation petition (Case 29-RC-089045) listed both Remington and HSS as the employer, indicating that *the Union knew that Remington would have to bargain with the Union* if employees selected it as their representative. I believe it can *reasonably be inferred* that the Union would have *communicated this fact to the employees* as well.

ROA.26 (footnote 12; emphasis added).

Moreover, and finally, on the question of whether *any* discrimination to be found, in fact, discouraged union membership, the facts speak loudly that such did not happen here. The dissent correctly reasoned:

> Nor is there any evidence that the outsourcing *caused* the housekeeping employees to be "encouraged or discouraged" in their union organizing efforts. *After* employees were informed that HSS was assuming responsibility for housekeeping, a representation petition was filed with the Board; a second representation petition was filed on September 11 (naming HSS and Remington as the employer), and amended petitions were filed on September 21 and October 16.
>
> ROA.5 (emphasis in dissent).

The bottom line: Remington, motivated by a legitimate business concern, simply outsourced the staffing of its housekeepers, but did not subcontract away its responsibilities as the employer – including the duty to recognize and bargain with the union – and its actions in doing this had no discouraging effects on the employees in their exercise of their Section 7 right to form or join into a union.

C. The Board's Finding of an 8(a)(1) and (3) Violation in the Discharge of Margaret Loiacono is Not Supported by Substantial Evidence and Correct Law, and this Court Should Approve and Adopt the Better-Reasoned Dissent.

The ALJ found that Ms Loiacono's actions on December 30 – when criticizing the campaign/informational pie chart at a time when she was required to be present in the lobby performing her duties – was not engaged in protected concerted activity. The 2-1 Board majority noted the General Counsel filed no exceptions to that finding, and did not challenge or reject it. ROA.3.

"Nevertheless," the Board went on to rule, "we agree with the judge that her discharge was unlawful," stating further:

> Regardless of whether Loiacono's initial complaints [about the pie chart] constituted Section 7 activity, the record supports an inference that [Remington's management] believed that Loiacono would speak out against [Reminton's] position in the campaign and would incite others to the same. By discharging her for that reason, [Remington] violated Section 8(a)(1) and (3) of the Act.

Id., citing, as authority for the finding of the violation, *Dayton Hudson Department Store Co.*, 324 NLRB 33, 35 (1997) and *Parexel International*, 356 NLRB 516, 517 (2011).

The dissent, based on the undisputed finding that Loiacono "did not engage in protected concerted activity," asserted "this precludes a finding that Loiacono's discharge violated Section 8(a)(1)." ROA.8. In so deciding, the dissent pointed first to the Board's extensive case law on the question of under what circumstances the activities by a single employee can be deemed "concerted," and therefore trigger an 8(a)(1) violation, which protects the "exercise of the rights guaranteed in section 7":

> The Board has held that "to find an employee's activity to be 'concerted,' we shall require that it be engaged in *with or on the authority of other employees*, and *not* solely by and on behalf of the employee himself." [citing to, *inter alia*, *Meyers Indus*. 268 NLRB 493, 497 (1984) (*Meyers I*)]. It has also held that a single employee's efforts to induce group action may constitute concerted activity, but

> only where the conversation "'was engaged in with the object of initiating or inducing or preparing for group action or . . . had some relation to group action in the interest of employees."' [citing to *Meyers Indus*. 281 NLRB 882, 887 (1986) (*Meyers II)*]. And even if two or more employees engage in "concerted" activity, it is not protected by Section 7 unless there is a "purpose" that relates to "mutual aid or protection." [citing to *Fresh & Easy Neighborhood Market, Inc.*, 361 NLRB no. 12, slip op. at 13 (2014)]

ROA.7-8 (emphasis in original).

The dissent then correctly distinguished the cases relied upon by the Board majority. They are distinguishable, primarily, based on reasons to believe, in those cases, that the employee broke no work rule, and that the termination, therefore, was more readily implicated as a deterent to section 7 rights. In *Dayton, supra,* as the dissent pointed out, the "employer admitted that the employee 'did what she was supposed to do,' but it discharged her based on its belief that her act would 'get the union brewing again'." ROA.8 "Here," the dissent continued, "Loiacono was *not* doing what she was supposed to do--greet and assist guests in the hotel lobby--and there is no evidence that Remington believed Loiacono had done anything that assisted the Union." *Id.* (emphasis in original). In *Parexel, supra,* the employer met with the employee "to determine whether she had discussed" with other employees a perceived issue of pay disparity. Had discharge been issued based on such a discussion, a clear violation would be found, as discussions among employees on matters related to wages are plainly protected by section 7. Although

the employer determined that no such discussion had taken place, the employer still discharged her. The dissent noted that the violation found in *Parexel* was based on the Board's finding that she was "discharged to *prevent* those conversations from taking place." *Id.* (emphasis added). "In the instant case," the dissent pointed out:

> . . . there is no evidence that Remington either believed Loiacono had engaged in protected concerted activity (as the judge found, she had not) or feared that she would engage in such activity. At most, Remington was concerned that Loiacono would be difficult and hypertechnical as an *individual* employee. Such a concern about a single employee's individual conduct is not elevated to an 8(a)(1) violation merely because *other* employees were engaged in union organizing activities at the time.
>
> ROA.8

Remington respectfully submits that the dissent's reasoning, and application of Board law, is more sound. The dissent correctly distinguished *Dayton* and *Parexel*. Thus, this presents a case where the Board has found a violation without having first established a violation of section 7 rights. The majority, in fact, left standing the ALJ's correct finding that there was no such violation. The inquiry should have ended there, and as the dissent correctly concluded: "this precludes a finding that Loiacono's discharge violated Section 8(a)(1)." ROA.8. The violation found by the Board's majority should not be enforced by this Court.

VIII. CONCLUSION

Petitioner Remington respectfully requests that this Court deny enforcement of the Board's decision and order, which found a violation of sections 8(a)(1) and (3) of the Act related to Remington's decision, in the summer of 2012, to outsource the staffing of the housekeeping department at the Hyatt Regency Long Island.

Petitioner Remington additionally requests that this Court deny enforcement of the Board's decision and order, which found a violation of sections 8(a)(1) and (3) of the Act with respect to the discharge of employee Margaret Loiacono.

Dated: June 16, 2016

Respectfully Submitted,

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Dated: June 16, 2016

/s/Karl M. Terrell
Counsel for Petitioner/Cross-Respondent

CERTIFICATE OF FILING AND SERVICE

I hereby certify that on this 16th day of June, 2016, I caused this Corrected Brief of Petitioner Remington Lodging & Hospitality, LLC to be filed electronically with the Clerk of the Court using the CM/ECF System, which will send notice of such filing to the following registered CM/ECF users:

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